



REPUBLIC OF KENYA



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**Consolidated Bank Finance Limited v Shah (Civil Appeal 77 of 2018)
[2025] KECA 1479 (KLR) (12 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1479 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 77 OF 2018
FA OCHIENG, LA ACHODE & AO MUCHELULE, JJA
SEPTEMBER 12, 2025**

BETWEEN

CONSOLIDATED BANK FINANCE LIMITED APPELLANT

AND

KAPURCHAND DEPAR SHAH RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi
(Nambuye, J.) dated 21st day of September 2012 in HCC Case No. 2723 of 1998)*

JUDGMENT

1. This is the first appeal of Consolidated Bank Finance Ltd, the appellant, against the judgment at Nairobi, dated 21st September 2012 by Nambuye J, entered in favour of Kapurchand Depar Shah, the respondent.
2. The respondent, filed a plaint dated 20th November 1998, in the High court at Nairobi against the appellant. His case was that at the material time, he was the sole proprietor of Nyeri General Stores, and also the registered owner of motor vehicles registration numbers KWD XXX, KWS XXX and KWS XXX (suit vehicles). He was also one of the directors of a company named Aberdare Oil Millers Limited (the company) which borrowed Kshs. 940,000.00 from the appellant and secured it with the suit motor vehicles.
3. The respondent averred that on 14th October 1996, he and the appellant reached an agreement in which he was to pay Kshs. 1.5 million in full and final settlement and satisfaction, of the indebtedness owed to the appellant by the company. In return, the appellant agreed to return the logbooks and transfer forms concerning the suit motor vehicles, confirm that no further monies were owing to it, and stop the criminal proceedings it intended to bring against the respondent.
4. However, the appellant went ahead and instituted criminal proceedings against the respondent, being Criminal Case No. 3097 of 1996 in which he was charged with fraudulent disposition of mortgaged



goods, contrary to section 291(1) of the Penal Code. The respondent stated that motor vehicle registration no. KWD XXX had broken down and was not road worthy, and the appellant's agents and representatives had been invited to inspect the stored parts of the said vehicles. That therefore, the prosecution instigated by the appellant was unjustified and malicious, considering that the appellant was aware that the respondent had committed no criminal offence.

5. The respondent sought the following orders:
 - a. An injunction restraining the defendant from interfering with the quiet possession of motor vehicle registration numbers KWD XXX, KWS XXX and KWS XXX.
 - b. An injunction restraining the defendant by itself its agent and or, servants from taking possession of the afore-said vehicles.
 - c. A declaration that the defendant is not entitled to detain the afore-said logbooks and Transfer Forms pertaining to the said vehicles.
 - d. special damages of Kshs. 348,000.00
 - e. General damages
 - f. Punitive damages
 - g. Costs of this suit.
6. In response, the appellant filed a defence and a counterclaim dated 21st January 1999 and amended on 17th May 2002. Its case was that it lent the company Kshs. 940,000,000 at the request of the respondent, to be paid with interest, and the suit vehicles were provided as security. The respondent failed to repay the loan despite persistent demands. He paid Kshs. 1,500,000.00 in 1996 leaving a balance which continued to attract interest at the commercial rate of 34% and the debt stood at Kshs. 10,552,007.70 as at 31st December, 1998.
7. The appellant denied that it instituted criminal proceedings against the respondent and asserted that the prosecution was instituted by the police and all that the appellant did was to give evidence in good faith. It denied that it acted maliciously and also denied particulars of special damages. It filed a counterclaim for the outstanding loan of Kshs. 10,522,007.70, plus interest at 34% p.a. until payment in full.
8. The respondent filed a reply to the amended defence and a defence to the counter claim dated 8th August 2002. He denied that the money lent to the company was at his express request, and averred that he was not liable in law to pay it. He maintained that his pledge for the suit motor vehicles was restricted to the sum of Kshs. 1.5 million only and admitted that the money owed by the company had not been repaid as the company was placed in receivership.
9. During the hearing, the respondent reiterated the contents of the plaint. He recalled that on 23rd October, 1996 the appellant called him to their premises at Haile Selassie Avenue, where he met with one, Mr. Mwanzia, the officer in charge of investigations who had signed letters addressed to him. Mr. Mwanzia recorded his statement without informing him the reasons for it, but once he made the statement, he was taken to Kileleshwa police station, booked in the OB, and placed in the cells. He was charged with a criminal offence which he learnt of the following day when he was taken to court. He was tried and judgement subsequently delivered on 6th February 1998.
10. The respondent testified that the company stopped repaying the loan after some time when it went into receivership. By then, it had repaid Kshs. 230,000.00 and there was correspondence with the appellant



on why the repayments stopped. The vehicles used as security were old and the appellant gave the respondent permission in writing, to remove parts from one unroadworthy vehicle and use them to repair the other vehicles so that the repaired vehicles could be used to earn income.

11. The respondent asserted that he did not take a personal loan from the appellant and that he paid the Ksh.1.5 million because he wanted to get his logbooks back and the appellant did promise to withdraw the criminal case against him.
12. Jihim Mwaniki Gikonyo DW1, an employee of the appellant as a Relevance Officer in the Credit department, testified that by a letter dated 8th February 1989 the company requested a loan of Kshs. 2 million from the appellant to import crude palm oil. In response, the appellant agreed through a letter dated 5th April 1989, to advance the company a loan of Kshs. 940,000 and in exchange, the respondent offered the suit motor vehicles as security for the loan.
13. DW1 stated that when the respondent failed to pay the loan, a repossession order dated 25th August 1994 was given to the Auctioneers to repossess the suit vehicles. Those who went to repossess the suit vehicles reported that the Lorry KWD XXX was found as a shell without the chassis, engine or wheels. The other two vehicles were mobile but could not be found. He denied that the appellant gave the respondent authority to vandalize one lorry and use the parts to repair the other vehicles.
14. DW1 stated that the appellant was the complainant in Criminal Case No. 3097 in relation to the vandalized vehicle registration no. KWD XXX. He asserted that the appellant was not malicious and neither was there an agreement for it to release the suit vehicles after the respondent paid Kshs.1.5 million.
15. The learned Judge, upon considering the suit before her, found in favour of the respondent and dismissed the appellant's counter-claim.
16. The judgment aggrieved the appellant hence this appeal. In its Memorandum of Appeal dated 12th March 2018, the appellant assailed the trial Judge on nine grounds as follows:
 1. For making a finding without supporting evidence, that the decision to prosecute the respondent was taken by the defendant's agent.
 2. For applying principles applicable to a temporary injunction to the prayers for a permanent injunction herein.
 3. For making a finding that "the court has already found as a fact that the payment of Kshs. 1.5 million was made in full and final settlement of the indebtedness of Aberdare Oil Millers Company Limited to the defendant"
 4. For failing to find that indeed the respondent signed the Chattels Mortgage for the vehicles in his personal capacity and not as director of Aberdare Oil Millers as the said Chattels were registered in the respondent's name and not that of the said Company.
 5. For ordering the return of the logbooks charged to the appellant to guarantee the loan to Aberdare oil millers, when there was no finding that Aberdare Oil Millers had fully repaid the loan to respondent as the said company was not a party to the proceedings before the court.
 6. For finding that the prosecution of the respondent in the criminal matter was malicious, merely on the basis of the fact that the respondent was acquitted in the criminal trial.
 7. For finding that the appellant accepted payment of Kshs. 1.5 million in full and final settlement of the appellant's claim against Aberdare Oil Millers.



8. For ignoring the chattels mortgage signed by the respondent, restraining the appellant from taking possession of the said chattels and ordering return of the chattels logbooks.
9. For awarding special and general damages in favour of the respondent when the respondent had not proved malicious prosecution against the appellant.
17. Through written submission dated 25th September 2018, filed on its behalf by the firm of M/S Riunga Raiji & Company Advocates, the appellant urged that the learned Judge erred in finding that the criminal court's holding that the prosecution of the respondent was without foundation. That the criminal court found that even if the respondent cannibalized parts of one vehicle to service another, that did not amount to intent to defraud. It was submitted that the appellant did not authorize the respondent to vandalize the said vehicle.
18. The appellant urged that cannibalization of one vehicle, whether the respondent stored some of the parts or not, was justification enough for it to report a crime to the police and such a report cannot in the circumstances, be said to have been malicious or without reasonable cause. To bolster this argument, the appellant relied on the case of Robbert Okere Ombeki v Central Bank of Kenya (2015) eKLR, where it was held that acquittal in a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.
19. On whether there was an agreement by the parties for the respondent to pay kshs.1.5 million to the appellant in full settlement of the debt, the appellant urged that this agreement did not materialize. It was averred that by a letter dated 29th February 1996, the managing director of the appellant made a proposal to the respondent to pay the said sum to settle the outstanding loan. However, the respondent and R.K. Shah the directors of the debtor, vide a letter dated 17th April 1996, made a counter offer to pay a sum of Kshs, 1 million in full settlement of the debt. The appellant rejected the counter offer and retracted its own offer vide a letter dated 26th April 1996, making it clear that the amount owing was Kshs. 8,696,681.10 and there would be no discount.
20. The appellant urged that the respondent was not the debtor and that is why it abandoned the counter claim which could only have succeeded if the debtor was a party in the suit. Therefore, the court was in error to make an award in favour of the debtor who was not a party to the proceedings before it. It relied on the decision in Robert Njoka Muthara & Anor vs Barclays Bank of Kenya Limited & Anor (2017) eKLR to urge that only the Company could maintain a claim that it had paid the entire amount under the facility.
21. In conclusion, it was contended that the learned trial Judge misdirected herself in justifying the grant of a permanent injunction on the principles applicable for granting a temporary injunction. That the liability between the debtor and the appellant for which the chattels mortgage by the respondent was the security, had not been determined and the permanent injunction should not have been granted.
22. During the hearing on 3rd February 2025, Mr Kiura learned counsel was present for the appellant. He confirmed that the appellant's submissions dated 5th October 2018 were served upon the respondent on 5th November 2018. The respondent did not file any written submissions and there was no appearance on his behalf although his Counsel Mr. Ng'ang'a Munene was duly served with the hearing notice.



23. The duty of this Court on first appeal was stated in *Selle & another v Associated Motorboat Co. Ltd. & others* (1968) EA 123 follows:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

24. We have considered the record of appeal and the written submissions before us and distilled the following issues for our consideration:

- i. Whether the respondent proved malicious prosecution;
- ii. Whether there was an agreement by the parties for the respondent to pay Kshs. 1.5 million in full and final settlement of the debt owing; and
- iii. Whether the learned Judge erred in granting the permanent injunction.

25. We begin with the issue as to whether the respondent proved malicious prosecution. The law guiding malicious prosecution is well established. The action for damages for malicious prosecution is part of the common law of England. The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and actuated by spite rather than for public benefit. This tort originated in the medieval writ of conspiracy which was aimed against abuse of legal procedure. It was aimed at preventing or restraining improper legal proceedings. It suggests the existence of malice and the distortion of the truth. (See the decision of the African Court of Appeal in *Mbowa vs East Mengo District Administration* (1972) EA 352.

26. In *Mbowa* (supra) the Court set out the ingredients of malicious prosecution and expressed itself thus:

“Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some purpose other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff’s favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them, he would fail in his



action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged.”

27. The respondent’s evidence before the trial court was that he was summoned to the appellant and asked to write a statement.

Thereafter, he was informed that he had been charged with a criminal offence. The appellant transported him in their vehicle to Kileleshwa police station, where he was booked in the Occurrence Book and subsequently taken to court. We note that the appellant did not counter this evidence, except to state that their role in the prosecution was only to file a complaint concerning the cannibalized motor vehicle. From the foregoing chronology of events it is evident that the appellant instigated the criminal proceedings against the respondent.

28. The next question is whether the appellant’s action was within reasonable and probable cause. Reasonable and probable cause is explained in Paragraph 472 of Halsbury’s Laws of England, 4th Edition as follows:

....reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true, would lead to an ordinary, prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.

29. Reasonable and probable cause is an honest belief in the guilt of the accused person based on a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming they are true, would reasonably lead an ordinary prudent and cautious person in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

30. The Court of Appeal described reasonable and probable cause in the decision of *Kagame & Others v AG & Another* (1969) EA 643 as follows:

“Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution (per Rudd, J).



31. The magistrate's court in acquitting the respondent pronounced itself as follows:

“On request of the defence Counsel Mr. Hira, the prosecution produced an extract of the loan file in respect of the transactions between Aberdare Oil Millers Ltd and the complainant (ex.18). From it, it is clear that the company has express authority of the Financiers to repair the lorry in question, amongst others. The manner in which it was to be repaired in terms of replacement by modification of parts appears not to have been spelt out. This then was left to the company. There is no evidence that the store of the company was checked for parts alleged to have been disposed of and no witness said he investigated that aspect. The general impression I find from the loan file is that the company was under immense pressure to repay the loan and even if it cannibalized the parts of one to service the others in order to make money in order to repay the loan, this did not amount to an intent to defraud But even if I were wrong in so concluding, the accused has a good defence to the charge in his personal capacity rather than as a director of the Mortgagee.”

32. On appeal, the learned Judge rendered herself on whether the appellant was within reasonable and probable cause in instituting the prosecution thus:

“The court is alive to the requirement that in order for a litigant to succeed in such a claim there has to be demonstration that the defendant instigated the proceedings without probable or reasonable cause and that the said prosecution resulted in a determination in favour of the plaintiff. When applied to the facts herein the court is satisfied that the plaintiff has satisfied the afore set out ingredients because as found by the criminal court judgment, the defendant's instigation of the prosecution of the plaintiff for fraudulent disposition of mortgage goods contrary to section 291 (1) of the Penal Code, was without foundation and or reasonable justification or reasonable cause because the defendant did not confirm that the parts from the cannibalized vehicle were not available and stored as claimed by the plaintiff and instead that they had been disposed off as claimed by the defendant before moving to prosecute the plaintiff. The court therefore finds that the plaintiff has proved his claim under this head.”

33. We agree with the superior court's conclusion. There was no indication that the appellant was of the view that the respondent had fraudulently disposed of the mortgage goods.

34. From the foregoing analysis we find that the appellant had improper and wrongful motive in instigating the criminal proceedings against the respondent. The criminal proceedings having been terminated in favour of the respondent, we also find that he satisfied all the four elements for a claim of malicious prosecution. We therefore, have no basis to disturb the special and general damages awarded by the superior court.

35. The second issue is whether the parties agreed that the respondent should pay Kshs. 1.5 million in full and final settlement of the debt. The undisputed facts of the case are that the respondent did not take a personal loan from the appellant. The loan was taken by Aberdare Oil Millers Ltd, and the respondent gave his motor vehicles, (the suit vehicles) as security for the said loan. The debtor went into receivership thereafter, and was unable to complete the repayment of the loan.

36. The record indicates that the appellant made an offer to the respondent to pay Kshs. 1.5 million in full settlement of the loan and the respondent gave a counter offer of Kshs. 1 million instead. Through a letter dated 26th April 2006, the appellant rejected the respondent's counter offer and put him on notice that they intended to pursue the recovery of the outstanding debt through normal civil process,



and to also refer the matter to the Criminal Investigation Unit of the appellant for investigation of a crime committed.

37. The appellant did not mention its initial offer in the letter. However, from the tone of its letter dated 26th April 2006, it adjured the respondent to pay the outstanding debt that it stated to be Kshs. 8,696,681. This is what the letter stated in part:

“You are no doubt aware that vandalization of the above vehicles is a criminal offence which should be addressed separately. You must now address yourselves as to how you will be able to raise enough funds to pay Kshs. 8, 696,681 and forget that such a debt can be discounted without good reason”.

It is therefore clear that the parties did not agree in writing on the payment of Kshs. 1.5 million as full settlement of the debt.

38. However, it is on record that the respondent wrote a cheque for ksh1.5 million in favour of the appellant. The appellant accepted it and did not write back to the respondent to assert that the cheque would not be taken as full and final settlement of the debt. Even if we were to find (and we do not so find), that the cheque was not in full and final settlement of the debt, it is also notable that when the debtor failed to pay the debt, there is no evidence of attempts by the appellant to repossess the vehicles offered as security. Therefore, the appellant cannot hold the respondent liable in his personal capacity, for a loan offered to a company, for which he did not offer a personal guarantee and for which the appellant failed to realize the securities in place.

39. Turning to the last issue, the appellant faulted the learned Judge for applying principles applicable to a temporary injunction, to the prayer in this matter which was for a permanent injunction. A temporary injunction is interlocutory and is issued to maintain the status quo and provide interim relief during the pendency a case. A permanent injunction on the other hand, is a final and is issued after the case is concluded. It provides a long term solution to the issue at hand.

40. The prayer sought by the respondent in his plaint was for a permanent injunction concerning his motor vehicles. This distinction was enunciated in *Mburu v Kibara & 2 Others (Environment & Land Case 237 of 2021) [2022] KEELC 3226 (KLR)* as follows:

“A permanent injunction fully determines the rights of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant, in order for the rights of the Plaintiff to be protected.”

41. A prayer for injunction will succeed if the applicant establishes the three principles reiterated by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others CA No.77 of 2012 (2014) eKLR* as follows:

“...in an interlocutory application the applicant has to satisfy the triple requirements to:

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted,
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages



are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”(Emphasis ours).”

42. Upon considering the record of appeal and the appellant’s arguments, we are satisfied that the respondent established his case against the appellant. He also established that in the circumstances of this case, he would suffer irreparable loss, and the balance of convenience tilted in his favour. The learned Judge was therefore, correct in granting the permanent injunction.

43. In the end we find that this appeal has no merit and is dismissed in its entirety. The respondent having not participated in this appeal we make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF SEPTEMBER, 2025.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

